(12) (10) (9)

Supreme Court, U.S.
FILED
AUG 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-821, 87-827 and 87-109

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

PITTSTON COAL GROUP, *et al.*,

v. *Petitioners,*

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, Secretary, United States Department of Labor, *et al.*,

v. *Petitioners,*

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

v. *Petitioners,*

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

REPLY BRIEF FOR THE PITTSTON COAL GROUP AND CO-PETITIONERS

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REPLY BRIEF FOR THE PITTSTON COAL GROUP AND CO-PETITIONERS

INTRODUCTION

This case presents several issues of great importance. Central to the resolution of these issues is whether the Secretary of Labor violated the clear mandate of section 402(f)(2) of the Black Lung Benefits Act (the "Act"), 30 U.S.C. § 902(f)(2), by promulgating an "interim presumption" that requires at least ten

years of coal mine employment for its invocation on the basis of positive chest x-ray, biopsy, or autopsy evidence of pneumoconiosis, and that permits rebuttal based on medical evidence disproving presumed facts. 20 C.F.R. § 727.203 (1988).

The Fourth Circuit's opinion below holds that the ten year requirement and rebuttal format of the Labor rule violate section 902(f)(2). To remedy this perceived violation, the Eighth Circuit's opinion below requires the Secretary of Labor to reopen at least 94,000 previously adjudicated and denied claims, and relitigate them under 20 C.F.R. § 410.490 (1988), the Social Security Administration's ("SSA") version of the interim presumption.

Pittston and co-petitioners ("Pittston"), and the Secretary of Labor ("Secretary") seek reversal in both cases. Pittston argues that neither the Act nor its contemporary legislative history required the Secretary of Labor to publish an exact replica of the SSA rule. Instead, Congress intended and expected that Labor would promulgate a regulation that preserved the medical guidelines of the SSA rule and that properly suited the adversarial litigation of the Labor Department program. Pittston also contends that section 410.490 violates the Act in several ways and cannot be sustained under due process scrutiny. Further, the Eighth Circuit's reopening of closed cases is jurisdictionally barred by the Longshore Act, 33 U.S.C. §§ 901-952, and is otherwise prohibited by the rule of res judicata.

The Secretary claims judicial deference for the Labor Department rule, noting that the language and intent of the Act bound the Secretary to apply only the SSA medical guidelines and not section 410.490's internal evidentiary rules. Thus, it was permissible for Labor to condition operation of its presumption upon proof of ten years of coal mine employment, and to provide for rebuttal when the evidence disproves presumed facts. The Secretary and Pittston also rely upon post-enactment congressional ratification of the Labor rule. Responding to the Eighth Circuit's mandate, the Secretary relies upon the traditional rules limiting mandamus powers and upon principles of res judicata to demonstrate error in the Eighth Circuit's rejuvenation of previously denied and closed cases.

The *Sebben* plaintiffs and *Broyles* claimants have filed separate responding briefs. Both argue that Labor's rule is not entitled to judicial deference because it violates the plain language of 30 U.S.C. § 902(f)(2), and because the Secretary's proffered justification for her rule is merely a post hoc rationalization by appellate counsel. Sebben's Brief at 17-21, 36; Broyles' Brief at 14-21, 41. Both responding briefs concede, however, that the word "criteria" in 30 U.S.C. § 902(f)(2) means invocation, but not rebuttal, criteria. Sebben's Brief at 35; Broyles' Brief at 18 n.20.[1] Sebben argues that the addition of 30 U.S.C. § 945 to the Act in 1978 created an automatic "collateral right" to consideration under section 410.490 that has not been afforded to the class of claimants described in the Eighth Circuit's decision below. Sebben concludes that 28 U.S.C. § 1361 is available to remedy the Secretary's failure to honor her "clear duty" to review these claims under section 410.490. Sebben's Brief at 40-43.

Trade associations representing the workers' compensation insurance industry and the coal industry filed briefs amici curiae in support of reversal. The insurers contend that they wrote no policies for liabilities arising under section 410.490, were not asked to do so, and would not have done so. Insurance Industry Brief at 11, 18. The coal industry, which would be economically devastated far into the future by affirmance of the decisions below, highlights the advanced age of the affected claims, the Department of Labor's limited ability to defend claims paid by

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[1] Respondents' concession should not preclude the Court's consideration of this critical question. The Fourth Circuit held that section 410.490's rebuttal standards apply, and was obviously unable to reach the conclusion readily embraced by respondents that the word "criteria" in section 902(f)(2) refers only to "invocation criteria." *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987). The Secretary speculates (with uncertainty) that the rebuttal question may be deflected on the theory that the SSA rebuttal provisions are not exhaustive and that Labor's rebuttal format may not be more restrictive than SSA's. Secretary's Brief at 26 n.21. This speculation affords no comfort to employers who would be required to litigate claims under section 410.490 if the decisions below are sustained. It is a fact that in the almost 600,000 claims adjudicated by SSA under section 410.490 there are no published decisions that either permit or even acknowledge the possibility of rebuttal on the basis of medical evidence.

the Trust Fund,[2] and the evidentiary hurdles adopted by the circuits in their rebuttal holdings under section 727.203. The mine owners argue that these circumstances preclude any semblance of fair treatment for them if the decisions below are sustained. Coal Association Brief at 10-11, 16-18.

I. NEITHER THE LANGUAGE OF THE ACT NOR ITS LEGISLATIVE HISTORY PRECLUDES THE SECRETARY'S INTERPRETATION OF THE TERM "CRITERIA" IN 30 U.S.C. § 902(f)(2)

From its origins in a 1972 Senate Report, the black lung "interim presumption" was to consist of a combination of "evidentiary rules" and "disability evaluation criteria." S. Rep. No. 743, 92d Cong., 2d Sess. 18, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322. The distinction between evidentiary rules and disability criteria was well understood by Congress when it first considered the liberalization of Labor's eligibility rules. From 1973 to the promulgation of an interim presumption by the Secretary of Labor in 1978, Department of Labor officials were involved in ongoing deliberations with Congress, SSA and interested constituent groups concerning the application of an interim presumption in Department of Labor black lung claims. *See Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 398-99 (1973-1974) (testimony of Nancy M. Snyder, U.S. Department of Labor). When the debate began, the participants understood that the critical elements of the presumption were the medical test criteria contained in the SSA rule. *Id.* at 75 (testimony of Stephen Kurzman, Department

[2] No mine operator may participate as a party in any claim that is payable by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(b)(1). The Department of Labor has limited ability to defend claims and it is often precluded from challenging favorable x-ray evidence relied on by claimants. *Id.* § 923(b); Insurance Industry Brief at 9 n.9. This means, in effect, that for those miners with fewer than ten years of coal mine employment invocation of the section 410.490 presumption could be virtually automatic.

of Health, Education, and Welfare);[3] *id.* at 204 (testimony of Bruce Boyens, Legal Advisor, Black Lung Association);[4] *id.* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association); *id.* at 353 (statement of Bedford W. Bird, United Mine Workers of America);[5] *id.* at 367, 398 (testimony of John Rosenberg, Director, Appalachian Research and Defense Fund);[6] *id.* at 398 (testimony of Nancy M. Snyder).[7]

In the years that followed, there was no further discussion in testimony, debate or committee proceedings concerning the duration of employment required to invoke the SSA presumption. On the other hand, the medical test guidelines in the SSA rule continued to generate controversy. *See* Pittston's Brief at 8-10 & nn.6-18.

When Congress finally directed Labor to apply certain "criteria" in the categories of claims designated in 30 U.S.C. § 902(f)(2), Labor understood that it was required to write a regulation incorporating SSA's medical test guidelines. Labor did not believe that it was required to include in its presumption other parts of the SSA rule. There is no compelling reason why the Secretary should have reached any different conclusion. In the

[3] Assistant Secretary Kurzman's discussion of the SSA presumption is entitled "INTERIM GUIDELINES ON MEDICAL TESTS."

[4] In discussing SSA's rules, Mr. Boyens testified: "It seems as though a miner who is employed less than 10 years, who can come up with the medical evidence . . . [is] denied his benefits simply because of the fact he worked less than 10 years, thereby getting no benefit of any presumption under the law."

[5] Mr. Bird testified: "[Section 410.490] provide[s] that a man who has worked 15 years in the mines may qualify for benefits if he has x-ray proof of pneumoconiosis, or if he can show by scores on a ventilatory test that he is disabled . . . . "

[6] Testifying in favor of extending the presumption to Labor claims, Mr. Rosenberg stated: "A miner with 10 or 15 years might be required to meet the interim standards, and a miner with less than 10 years, perhaps, a more rigid standard."

[7] Ms. Snyder informed the Committee Chair: "I want to make it clear that we are only talking about one standard. We are talking about the ventilatory. We are not talking about the broad array of standards that were passed in the 1972 amendments."

vast legislative history compiled prior to promulgation of Labor's rule there are no specific references demonstrating that the Secretary of Labor's judgment was erroneous. In fact, there appeared to be agreement that this very powerful presumption should be available only if some significant duration of exposure was established. *See supra* notes 3-7.

Section 902(f)(2) requires application of the SSA "criteria," not SSA's regulation. The Secretary argues that "criteria" means "medical" criteria and that "medical criteria" means the specific medical test guidelines specified in section 410.490. Sebben and Broyles argue that "criteria" means the "invocation" rules, but not the "rebuttal" rules contained in section 410.490. Sebben's Brief at 35; Broyles' Brief at 18-19. Petitioners' interpretation of "criteria" draws support from the language and structure of the Act;[8] respondent's position does not. Respondents' "plain language" analysis shatters on their concession that Congress clearly expected Labor to exclude the rebuttal limitations of the SSA regulation.[9]

The pre-enactment history expresses no specific expectation that the Secretary of Labor must permit invocation by a short-

[8] In addition to the factors previously noted (Secretary's Brief at 18; Pittston's Brief at 20-21), Congress's recognition that there would be significant differences between SSA and Labor rules is clearly reflected in the claim review provisions of 30 U.S.C. § 945(a). A previously denied SSA claimant had the option to elect review by either Labor or SSA. *Id.* § 945(a) (1). If SSA review was elected and SSA approved the claim under section 410.490, the claim was transferred to Labor to be treated in all other respects as if the claim was filed with the Labor Department in the first place, except that the SSA determination of entitlement was binding on Labor. *Id.* § 945(a)(2)(A). The SSA loop would have little meaning if Congress expected absolute parity in the two agency's adjudications. *See also* 124 Cong. Rec. 3431 (1978).

[9] Respondents' challenge to the Secretary's statutory analysis of the term "criteria" offers little more than speculation that the word means only invocation standards. Respondents' statutory analyses are no more compelling than the Secretary's and are probably less so if carefully scrutinized. The Secretary is charged with the responsibility for enforcement of the Act. To be sustained, the Secretary's interpretation need only be reasonable, it "need not be the best one by grammatical or any other standards." *EEOC* v. *Commercial Office Prod. Co.*, 108 S. Ct. 1666, 1671 (1988).

term miner. The Secretary states that the repeated references to "medical criteria" in the legislative history refer to section 410.490's medical guidelines only. Sebben and Broyles argue that the references to "criteria" or "standards," whether or not modified by the word "medical," broadly refer to all of section 410.490(b), and in any case, proof of ten years of employment is a "medical" criterion.[10] Both the petitioners' and the respondents' arguments are plausible, and no ultimate conclusion can be verified from the congressional pronouncements upon which each relies. All parties agree, however, that Congress mandated different presumptions. Sebben and Broyles argue that these differences may be reflected solely in rebuttal provisions;[11] that is only their preference but there is no clear proof that it was Congress's.

Post-enactment congressional activity is more illuminating. Courts may not ignore post-enactment expressions of intent and should accord them the weight they merit. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982). Section 727.203 has been in existence for ten years without once drawing a word of congressional disapproval. During the same term of Congress in which 30 U.S.C. § 902(f)(2) was enacted, the rule was presented for approval to key House conferees. In formal public comment these members approved Labor's rule, with specific reference to the ten year requirement. Pet. App. 46a. The pre-enactment statements of these same members and the reports of the committees they chaired comprise approximately the entire legislative

[10] This latter prong of both responding arguments misses the point. Whether or not disease causation involves medical judgments when a person visits a physician, *see* Broyles' Brief at 39, section 410.490 contains no "criteria" for making such judgments. The Secretary of Labor was directed to apply "criteria" no more restrictive than criteria applied by SSA. The Secretary of Labor contemporaneously understood Congress's references to criteria to mean only the specific medical test guidelines adopted by SSA in section 410.490 for presuming the existence of compensable disability or death. SSA's rule contained no "medical criteria" for determining disease causation so there was nothing to adopt. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 404-05 (7th Cir. 1987).

[11] "Disease causation" may be rebutted under section 727.203(b)(4) but not section 410.490(c). It is difficult to see how the issue can be a mandatory medical criterion for purposes of invocation but not rebuttal.

history of section 902(f)(2) in the House of Representatives. While post-enactment written approval is not the equivalent of action by the Congress as a whole, given the members involved and the circumstances here, it is tantamount to just that and is highly persuasive. *See Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3255 (1986).

Further, Congress reviewed the program in its entirety in 1980-1981 and requested reports from the Comptroller General examining in detail both Labor and SSA eligibility provisions. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong. 1st Sess. 2-15 (1981) (hereinafter *1981 Oversight Hearings*).[12] The Comptroller General's report to the Congress specifically quoted Labor's rule requiring at least ten years of coal mine employment for invocation of Labor's interim presumption. Comptroller General of the United States, *Report to the Congress of the United States: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 11 (1982), *reprinted in 1981 Oversight Hearings, supra*, at 7. Allegations that Congress was unaware of the Secretary's ten year rule are not credible.

During the 1981 legislative process, neither Congress nor witnesses appearing before it criticized Labor's ten year rule. Congress concluded its deliberations by repealing several of the most significant benefit eligibility provisions enacted in 1972 and 1977, including three statutory presumptions available to long-term miners.[13] The interim presumption had aleady been repealed by regulation and required no congressional action.

[12] Broyles incorrectly states that the 1981 proceedings did not focus on medical eligibility rules. Broyles' Brief at 43 n.37. The amendments enacted in 1981 significantly revised statutory eligibility standards. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 202, 203, 95 Stat. 1643, 1643. Many witnesses in addition to the Comptroller General testified concerning Labor's eligibility standards. *1981 Oversight Hearings, supra*, at 27, 80, 125, 139, 207-22, 229-39, 253-56.

[13] These presumptions cannot be applied in claims filed on or after January 1, 1982. 30 U.S.C. §§ 921(c)(2), (4), (5).

20 C.F.R. Part 718 (1988).[14] "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'." *Schor*, 106 U.S. at 3255 (quoting *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-81 (1969)).

The legislative and statutory environment here is not unlike that in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory terms and preenactment legislative history fail to provide definitive answers. With respect to the ten year rule, the authorities relied upon by respondents contain no specific answer to the precise question presented. The Secretary of Labor was required to formulate a rule that satisfied the demands of some members of Congress to increase the number of awards made and, at the same time, to preserve the rights of claim defendants and the economic and scientific integrity of the program.[15] The agency's choice controls unless it is irrational or clearly at odds with the intent of the law. *Chevron, U.S.A.*, 467 U.S. at 865-66; *see also K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). The Secretary's rule reflects a reasonable accommodation in which Congress subsequently acquiesced and, as such, should be approved by this Court. *See Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).

II. THE SECRETARY'S TEN YEAR TRIGGER AND FULL REBUTTAL FORMAT MERIT JUDICIAL DEFERENCE

Broyles and Sebben insist that the ten year rule was adopted either by mistake or in a deliberate effort to violate congressional

[14] The Secretary of Labor was under no obligation to repeal the interim presumption if it proved scientifically valid. 30 U.S.C. § 902(f)(1).

[15] No case can be made to support the proposition that Congress was simply unconcerned with the economic impact of this program on the affected industries or that Congress intended the payment of benefits to miners regardless of the merits of their claims.

intent.[16] Sebben's Brief at 28, 38; Broyles' Brief at 42-44. Their position is erroneous for several reasons. In addition to the statutory language and legislative authorities cited, other factors support Labor's rule.

The Secretary's frequent involvement over many years with the congressional committees that drafted the Act and its amendments is one such factor. What is more significant from industry's perspective, however, is that neither Congress nor the Department of Labor had any scientific justification to make the interim presumption available to short-term miners. In opening briefs, petitioners note that pneumoconiosis is rare in miners with fewer than ten years of coal mine employment.[17] Secretary's Brief at 23-24; Pittston's Brief at 26 n.35. What is even more important is that the degree of "simple" pneumoconiosis found in the few short-term miners who contract the disease is too insignificant to cause impairment much less total disability. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Because of the proof difficulties in rebutting Labor's presumption and its extraordinary power to require awards where pneumoconiosis played only a trivial role in a miner's disability, *see* Coal Association Brief at 10-11 & nn.26-30, it was not unreasonable for the Secretary of Labor to limit availability of the presumption to situations where

[16] Respondents' description of the ten year rule as a mistake followed by a cover-up is naive at best. From the beginning, the black lung program has been literally overrun by congressional watchdogs. Each year from 1969 to 1981 saw congressional hearing after congressional hearing, reports and investigations. There is no likelihood that Labor's ten year rule — a rule significantly affecting almost 100,000 claims — simply escaped this attention. The "ten year" issue arose in claims litigation as a result of the creativity of claimants' attorneys, and not because of any breakdown in communications between Congress and the Secretary. Broyles' contrary assertion twists the facts. *See* Broyles' Brief at 42 n.36.

[17] Section 727.203 applies with equal force to both underground and surface coal miners. The evidence before Congress demonstrated that persons who work exclusively in surface coal mining do not contract pneumoconiosis. On the assumption that a few surface miners "who have worked in extremely dusty situations . . . for long periods of time" might get the disease, surface miners were included in the coverage of the Act. S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972).

there was a rational connection between proven facts and presumed entitlement.

The Secretary of Labor did not preclude short-term miners from obtaining benefits, as asserted by Sebben, but only required them to prove occupationally related total disability. Given the science of the matter, Labor's approach is plainly reasonable.[18]

Sebben suggests that depriving short-term miners of the interim presumption defeats the purpose of the claim review provisions of 30 U.S.C. § 945. Sebben's Brief at 18-20. This is incorrect. After enactment of the 1977 amendments, no claim was decided under SSA's permanent standards alone. The 1977 amendments included many significant liberalizations to be applied in all claims, including those of short-term miners. All previously denied claimants were afforded the opportunity to submit new evidence. 30 U.S.C. § 945(a)(1)(B), (2)(B). The Secretary was prohibited from cross-examining or otherwise disputing

[18] Broyles and Sebben incorrectly dispute congressional awareness of the absence of disease or disability in short-term miners. In 1969 the U.S. Surgeon General reported: "It is generally accepted by physicians that simple pneumoconiosis seldom produced significant ventilatory impairment . . . . For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appeared to be spotty and showed no particular trend." House Comm. on Education and Labor, 91st Cong., 2d Sess., *Legislative History: Federal Coal Mine Health and Safety Act* 572-74 (1970). The long history of the Act contains a considerable body of similar testimony. *See Hearings on S. 355, S. 467, S. 1178, S. 1300 and S. 1907 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. Part II at 587, 641, 699, Part III at A91-A96 (1969). Sebben's assertion (Sebben's Brief at 33) that neither Congress nor the Labor Department could have been aware of the study data cited in Pittston's Brief at 26 is incorrect. These data were derived from an ongoing study required by statute that began in 1970. 30 U.S.C. § 843. Cumulative data are reported to Congress 120 days after the beginning of each session of Congress. *Id.* § 958(a). There is no genuine scientific dispute over the fact that disabling pneumoconiosis in short-term underground miners is exceptionally rare and that it is essentially unknown in surface miners. *See generally* Lapp, *A Lawyers Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981).

a positive chest x-ray submitted by the claimant if it was originally interpreted by a qualified radiologist. *Id.* § 923(b).[19] Survivors of deceased miners were afforded the opportunity to obtain benefits solely on the basis of their own lay testimony. *Id.* Working miners were given the right to obtain an award if employment terminated within a specified period. *Id.* §§ 902(f)(1)(B), 923(d). And, the definition of "miner" was expanded to include many previously denied claimants. *Id.* § 902(d).

Labor's interim presumption neither defeats the purpose of the statute nor is it irrational. In fact, Labor's rule is perfectly consistent with a statutory scheme in which presumptions are available if duration of employment requirements are met, and unavailable if they are not met. *See id.* §§ 921(c)(1), (2), (4). It is perfectly consistent with the fact that there is little or no probability of a rational connection between proven disease and presumed total disability in the case of a short-term miner. It is also consistent with the Secretary's obligation to honor the statutory directive to permit an award only on account of total disability or death due to coal mine dust exposure. *See id.* § 901(a). And it is perfectly consistent with the Secretary's duty to preserve the rights of claim defendants and affordability of the program. Both Sebben and Broyles come to rest on the premise that the Secretary of Labor was obligated to ignore all other considerations and adopt the most generous entitlement scheme that could be devised. That is not a reasonable reading of the law. *Cf. Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983).

Respondents' argument that the ten year rule is merely a litigation position is clearly erroneous. The rule was published in

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[19] In original budget data submitted to Congress, the Department of Labor estimated that the cost of the x-ray review prohibition in 30 U.S.C. § 923(b) would exceed the cost of the adoption of an interim presumption ($832 million versus $800.5 million). This estimate was revised downward on Labor's unfounded assumption that claimants' physicians would do a better job interpreting x-rays in the future. Staffs of Joint Comm. on Taxation and Senate Comm. on Finance, 95th Cong., 2d Sess., *Tax Aspects of Black Lung Legislation: S. 1538*, at 10 (Comm. Print 1977).

the Federal Register ten years ago by the Secretary of Labor. 43 Fed. Reg. 17,770 (1978). There has been no change in the rule or the agency's position since that time. Respondents characterize the Secretary's arguments as "post-hoc rationalizations of counsel" on the theory that the statutory arguments made by government counsel have been refined since the issue arose in 1981, Broyles' Brief at 46, and on the allegation that the Secretary has done an inadequate job explaining the ten year rule, Sebben's Brief at 37-38. These arguments are not persuasive. An agency is not required to set out its legal arguments in support of a rule prior to litigation. *Cf. Bellotti* v. *Baird*, 428 U.S. 132, 143 n.10 (1976).

Respondents ask this Court to apply the litigation position exception because of subtle refinements in agency arguments over the course of many years. This exception to the deference rule has not been stretched nearly so far by this Court. It is preposterous to suggest that an agency's published interpretation of a statute may be deprived of validity because successive government counsel become more skilled at arguing the agency's position over the course of repetitive litigation.

The existence of a litigation position to which no deference should be accorded may be discerned from a change in position during the course of litigation or from an absence of proof that the agency addressed and answered the question prior to litigation. *See Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 143-44 (1984). These circumstances do not exist here. The ten year rule is an unambiguous, published interpretation by the agency. The agency's actions in administering the rule have never varied. The arguments made by government counsel in support of the rule have been consistent. It is clear that the statutory interpretation reflected in Labor's rule was made by the agency and not its lawyers.

III. THIS COURT MAY NOT PROMULGATE SECTION 410.490 FOR THE SECRETARY OF LABOR

On the assumption that this Court will be persuaded of the invalidity of Labor's ten year rule, respondents ask the Court to

promulgate section 410.490's invocation (but not rebuttal) provisions for the Labor Department. Sebben's Brief at 38 n.76; Broyles' Brief at 47. Respondents assert that section 410.490(b) is part and parcel of the Act and thus requires no rulemaking for its application.

Courts are not vested with authority to write agency regulations. *See Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). Congress neither wrote nor intended to write agency rules in 30 U.S.C. § 902(f). Congress provided guidelines to be sure, but it instructed the Secretary of Labor to promulgate regulations implementing the statutory guidelines. There can be no argument on this account. 30 U.S.C. §§ 902 (f) (1), 936(c); H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309.

What is most troubling about respondent's request that this Court simply declare section 410.490(b) to be a statutory provision is that the substantive standards at issue have never been tested in either the legislative or regulatory process. Congress had no evidence to support the creation of a presumption of entitlement based upon proof of simple pneumoconiosis in short-term miners. To the contrary, Congress had a considerable body of evidence that no such presumption could be justified. *See supra* pp. 10-11. There have never been rulemaking proceedings in which section 410.490 was tested as a regulation affecting private rights.

If section 410.490(b) is treated as a congressional enactment, it must meet the test of reason. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 29. On the face of the legislative record, a presumption of total disability or death due to pneumoconiosis for a short-term miner meeting the specified medical criteria is a purely arbitrary mandate. At best, Congress has never fully investigated the question. If section 410.490 is tested as an agency rule, it must glean support from the administrative record compiled by the agency. No such record exists.

It would be wholly inappropriate for this Court to adopt a rule of substantive law of considerable impact that has never passed muster in the legislative or regulatory process.

IV. THE MANDAMUS STATUTE DOES NOT OVERRIDE THE LONGSHORE ACT OR PRINCIPLES OF RES JUDICATA IN PART C BLACK LUNG CLAIMS

Sebben's arguments in support of the Eighth Circuit's decision presume that the body of procedural law that has evolved under the Social Security Act is applicable, at least by analogy, in Department of Labor black lung claims. The premise is clearly flawed. The Social Security Act does not apply. The Longshore Act sets the rules of procedure for these claims, 30 U.S.C. § 932(a), and it, like the Social Security Act, contains a unique and independent adjudicative format. *See Crowell* v. *Benson*, 285 U.S. 22 (1932); *see also Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1 (1975).

Longshore Act procedures are designed for the adjudication of private rights in the course of adversary litigation. *Crowell*, 285 U.S. at 51-54. Social Security procedures are not. *See Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). After a Social Security Act claimant submits a proper claim, subsequent time limitations and exhaustion requirements may be waived. *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). Prior to *Sebben*, all circuits agreed that each movement of a Longshore Act claim from one level of adjudication to another imposes a non-waivable jurisdictional requirement on the party seeking further agency or judicial review.[20] The Social Security Act authorizes eventual district court review of SSA decisions on the merits of the case, *Weinberger* v. *Salfi*, 422 U.S. 749, 763 (1975), while the Longshore Act does not, 33 U.S.C. § 921(e). It is arguable whether the Social Security Act embodies traditional res judicata principles. *See Schweiker* v. *Chilicky*, 108 S. Ct. 2460, 2468 (1988). The Longshore Act does embody such principles. 33 U.S.C. § 921(a),

[20] The many cases so holding are cited in Pittston's Brief at 37-38 nn.55 & 56; Secretary's Brief at 34.

(c); *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986).

Sebben ignores the exclusivity of the Longshore Act remedy. He argues that the rights conferred by 30 U.S.C. § 945 to review under section 410.490 (or at least the invocation portion of it) are "collateral" to his claim for benefits and cannot be remedied under the Longshore Act. Sebben's Brief at 43-44. This argument is far off the mark. The right conferred in 30 U.S.C. § 945 is a right to utilize Longshore Act procedures for readjudication under an array of statutory provisions enacted in 1978. 30 U.S.C. § 945(a)(3)(A). Any such review was to be conducted under rules subsequently published by the Secretary of Labor. *Id.* §§ 902(f)(1), 936. There is no statutory guarantee that any or all of the revised rules must benefit every claimant. *Id.* § 945(a)(1)(A)-(B), (b)(2)(A). All claimants in the *Sebben* class had their claims reviewed pursuant to 30 U.S.C. § 945, but were denied benefits because the evidence failed to establish entitlement. Sebben is dissatisfied with the Secretary's application of the substantive law, but this is not collateral to Sebben's claim.[21] Congress has provided an exclusive procedure to address the dispute. 33 U.S.C. § 921(e).

Sebben's allegation that there was no adequate remedy at law is tied to the fiction that a claimant not provided "automatic" review[22] under section 410.490 would simply give up and fail to

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[21] Even if it were collateral, it is difficult to see what difference it makes with respect to the district court's jurisdiction under 28 U.S.C. § 1361. Sebben's reliance on *Eldridge*, 424 U.S. at 330-31 & n.11, regarding "collateral" matters is misplaced. *Eldridge* merely restates the rules governing appeals of non-final orders. All persons in the *Sebben* group had final orders, but did not exercise their appeal rights. Moreover, allegations of irreparable harm to *Sebben* class claimants are similarly without factual foundation or legal significance. No harm accrues to a litigant solely because he is required to advocate his case in keeping with statutory procedures.

[22] While some, but not all, of the claimants in the *Sebben* class were entitled to automatic review, none were entitled to an automatic award of benefits. In order to obtain a final award or sustain an initial determination, *see* 30 U.S.C. § 945(a)(2)(A), many of these claimants would be required to overcome

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pursue available remedies. Many claimants did not pursue their claims after automatic review, but many thousands did. We have no way of knowing what factors influenced their individual decisions. It is clear, however, that remedies were available. These remedies were published and fully adequate, and all claimants were informed of their rights.[23] These claimants, like all other civil litigants, are charged with knowledge of the available procedural rights. *Atkins* v. *Parker*, 472 U.S. 115, 130 (1985). Sebben contends that the pursuit of these remedies would have been futile, but does not and cannot make a showing to support that assertion. Failure to pursue these rights is clearly not a proper reason supporting equitable relief under the mandamus statute. *Cf. Lyng* v. *Payne*, 106 S. Ct. 2333, 2341 (1986).

For almost two centuries, this Court has refused to permit the exercise of mandamus powers if the party seeking the writ has an adequate remedy at law. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 169 (1803). If the alternative remedy prescribed is exclusive, and Congress has so provided, it is difficult to imagine circumstances in which mandamus powers are properly exercised.[24]

Building on the assumption that the claimants in the *Sebben* class never had a right to review de jure, Sebben asserts that res judicata principles become irrelevant. " '[N]o principle of law or equity . . . sanctions the rejection by a federal court of the salutary principle of *res judicata*.' " *Federated Dep't Stores, Inc.* v.

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a mine owner's defense to the claim. Claimants who filed before July 1, 1973, *id.* § 945(a), or after March 1, 1978 were not entitled to automatic review but are included in the *Sebben* class. If Sebben's argument is accepted, the remedy cannot apply to those individuals because the Secretary of Labor did not owe them a non-discretionary duty of review.

[23] Department of Labor forms CM1000a, or 1000b, or 1000c, or 1000d were sent to all denied claimants and these forms each contained several pages of information on how a claimant could have pursued further remedies.

[24] An infringement of constitutional right would, in all likelihood, be an exception to the rule. *See Johnson* v. *Robison*, 415 U.S. 361, 366 n.7 (1974). This case involves no arguable claim of constitutional right on the part of the *Sebben* class.

Moitie, 452 U.S. 394, 401 (1981) (quoting *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946)). Sebben fails to cite any exception to this rule to justify its abrogation here. In many of the *Sebben* class cases the employer litigated and prevailed. There is no precedent supporting the use of mandamus powers to undo the res judicata effect of these prior proceedings. It makes no sense for this Court to hold that the adjudications that took place and became final simply never happened.

Overall, Sebben's effort to sustain the Eighth Circuit's reopening of tens of thousands of cases rests on an exaggerated and contrived portrayal of the Secretary of Labor's alleged breach of duty to short-term coal miners, and an equally understated estimation of the enormous hardship that would follow enforcement of the Eighth Circuit's order. The clear non-discretionary duty on which Sebben relies is nowhere stated, with even minimal specificity, in the Act or legislative history.

Since mandamus is a remedy in equity, its impact on all parties involved must be considered. The insurance industry details the enormous potential cost to the coal industry and insurers of reopening and relitigating tens of thousands of affected claims.[25] Insurance Industry Brief at 9. It is noted, correctly, that none of this liability was anticipated or funded.

Reopening presents difficult problems beyond its economics. The claims affected will be ten to twenty years old by the time they are considered. Records have been lost and destroyed, witnesses are no longer available, and many miners are deceased. Moreover, it is extremely difficult to prove, in a presumption

[25] Sebben states that these costs are largely based on the irrebuttability of the SSA presumption. Sebben's Brief at 46. While rebuttability is a significant factor, it is not the fundamental premise of the insurers' cost analysis. Even if the Labor rebuttal provisions applied, invocation of the presumption remains the critical element in producing an award. The unfunded costs associated with reopenings, new trials, new evidence, and an aging population of claimants remains in the billions of dollars. The Court should also note that benefits are paid retroactively to the date of original filing in most cases. *See Curse* v. *Director, Office of Workers' Compensation Programs*, 843 F.2d 456, 461 (11th Cir. 1988).

rebuttal inquiry, that pneumoconiosis "played no part" in the inability of a seventy or eighty year old retired miner[26] or a now deceased miner to perform his prior coal mine work. *See Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). In many of these cases, the mine owners' first knowledge of the existence of a claim would occur in the reopening proceedings.[27] There is a genuine question whether a mine owner's due process rights can be preserved in these circumstances. *See Federal Deposit Ins. Corp.* v. *Mallen*, 108 S. Ct. 1780, 1788 (1988).

The circumstances neither permit nor otherwise justify the overwhelming relief granted by the Eighth Circuit. The Eighth Circuit had no sound legal basis for authorizing a waiver of the Longshore Act's jurisdictional requirements. It had no valid basis on which to abrogate res judicata to the substantial detriment of the private interests of mine owners and their insurers. The courts below erred in treating the Labor Department's black lung program as the legal equivalent of the entitlement programs administered by SSA, and they clearly misapprehended the respective rights of the parties as well as the legal duties of the Secretary of Labor.

[26] Most claims are first filed when a miner reaches normal retirement age.

[27] Labor did not necessarily notify defendants of the existence of claims unless, following an ex parte administrative denial, the claimant indicated an intent to further pursue the case. 20 C.F.R. § 725.412(a) (1988).

CONCLUSION

The decisions of the Fourth and Eighth Circuits should be reversed.

Respectfully submitted,

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August 25, 1988

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